INDEX.

A

ACKNOWLEDGMENT.

1. A deed executed November 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri. *Reaume* v. *Chambers*, 36.

ACTION FOR THE DELIVERY OF PERSONAL PROPERTY.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight* v. *Crinnion*, 559.

ADMINISTRATION.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee* v. *Agee's Adm'r*, 366.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Spech* v. *Wohlten*, 310.
3. Where a sale of real estate of a decedent for the payment of debts is approved by the probate court at the same term during which the sale takes place, the heir, not having notice of such approval, so that he is deprived of his appeal, may call in question such approval in a suit brought against him by the purchaser for a devestiture of title. *Ib.*
4. A sale by an administrator, under an order of the county court, of an equity of redemption in a slave, is valid, although the slave is in the

ADMINISTRATION—(*Continued.*)

possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the slave. *Phillips* v. *Hunter*, 484.

5. Where, in a case of the death of one of two partners, the survivor gives the bond required by the 50th and 51st sections of the first article of the administration act (R. C. 1845, p. 70), with approved securities; *held*, that such survivor can not be removed by the probate court and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident of the state. *Green's Adm'r* v. *Virden*, 606.

ADMISSIONS.

See EVIDENCE, 6, 8.

AFFIDAVIT.

1. On a motion for a new trial on the ground of newly discovered evipence, the affidavit of the party to the suit will not itself suffice; the affidavit of the new witness must be produced or its absence accounted for. *Boggs* v. *Lynch*, 563.

AGREEMENT.

See POLICY OF INSURANCE; EVIDENCE, 14; PARENT AND CHILD, 1.

1. P. & A., partners, commission and forwarding merchants in St. Louis, advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. J. S. delivered to P. & A. 386 barrels of lard with the request that it should be "sent forward from New Orleans to Liverpool, provided your (P. & A.'s) correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest." P. & A. made advances upon said lard, and shipped the same to their correspondents in New Orleans, with instructions to ship the same to Liverpool, provided it could be drawn upon so as to cover the advances made to J. S. by P. & A., with charges, &c., otherwise to sell the same in New Orleans. The New Orleans house, not being able to secure advances so as to cover the advances of P. & A., sold the lard, and failed soon after, not having rendered any account of the proceeds. *Held*, in a suit by P. & A. against J. S. to recover the advances made by P. & A., that it should be left to the jury to determine whether it was not the understanding of the parties that J. S. should look to P. & A. for the money arising from the sale of the lard; in short, whether P. & A. were not the agents for the sale of the lard, and those whom they employed, their sub-agents, for whose conduct they are liable. *Pomeroy* v. *Stigerson*, 177.
2. A barge was hired of A. by a steamboat, and it was agreed in writing that on the giving of notice the barge should be delivered up to A., "with the understanding that if froze up in the ice the sum above mentioned (eight dollars per day) is not to be paid, but only for the time the barge is in actual service, subject to his order, by giving notice

AGREEMENT—(*Continued.*)

one trip previous to leaving port, and is to be delivered in good order, the usual wear and tear excepted." The barge was destroyed by the ice in the Mississippi, without fault on the part of the defendant. *Held*, that the steamboat was not liable on the contract for the non-delivery of the barge. Whether the steamboat assumed the obligation to return the barge at all events, and notwithstanding any overpowering force, is a question of intent, to be determined by a proper construction of the terms of the contract. (SCOTT, J., dissenting.) *McEvers* v. *Steamboat Sangamon*, 187.

3. A contract in consideration of refraining from bidding at a judicial sale is void. *Hook* v. *Turner*, 333.
4. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment, that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee* v. *Agee's Adm'r*, 366.
5. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defence arising out of the relation of principal and surety. *Picot* v. *Sigutago*, 587.
6. A. and B. executed a bond whereby they obligated themselves "as principals" to build a house for C., the house to be built by A.; payments to be made as the work should progress, retaining twenty-five per cent. on the amount of work done, and the balance after the entire completion of the work, &c., to the satisfaction of the said C., and after the settlement of "all lawful claims, liens or demands against said work, on account of materials furnished or work done;" and C. to be secured "from all claims and losses." Liens were filed by material men against the building, which were paid by C. *Held*, in a suit by C. against B., that B. could not set up as a defence that C. had paid to A. the whole value of the work done, not reserving the 25 per cent.; he (C.) not knowing at the time that there were valid liens upon said building. *Ib.*
7. In order to entitle C. to recover compensation in such a case, it is not necessary that payment of the sums for which the liens were held should be first enforced by suit and execution. All that is necessary is that they should be valid liens and enforceable. *Ib.*

ALTERATION.

1. Where a material alteration is made in a promissory nate by one unauthorized by, and without the knowledge or consent of, the owner of such note, the note is not thereby avoided as against such owner. *Lubbering* v. *Kohlbrecher*, 596.

AMENDMENT.

See RECOGNIZANCE.

1. Where an appeal is taken from a justice of the peace in a proceeding under the landlord and tenant act, and the transcript is filed by the

AMENDMENT—(*Continued.*)

justice in the land court; *held*, that it is error to dismiss the appeal on motion of the appellee, on the ground that the recognizance stated the appeal to be to the law commissioner's court, a motion for leave to amend the recognizance having been made before the motion to dismiss was disposed of. The court should have permitted appellant to file a good and sufficient recognizance. *Matthews* v. *Gloss*, 169.

2. Where a new trial is granted on the motion of defendant, on condition that defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment (as by giving judgment for the possession of land, in accordance with the verdict of the jury, where, through inadvertence, a judgment for costs alone had been entered) after the order for the new trial is made and before the costs are paid. *Blumenthal* v. *Kurth*, 173.

APPEAL.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 4.

APPEAL BOND.

See RECOGNIZANCE.

APPOINTMENT.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee* v. *Agee's Adm'r*, 366.

ARRAIGNMENT.

1. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief—all the witnesses for the prosecution having been sworn—it is discovered that the prisoner has never been formally arraigned, and by order of court he is then arraigned and pleads not guilty, and objects to any further proceeding in the cause, asking that he may be discharged; *held*, 1st, that it is not erroneous, to so cause him to be arraigned; 2d, that it is not erroneous, the jury being re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn. *State* v. *Weber*, 321.

ASSESSOR.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane* v. *Todd*, 90.

B

BAILMENT.

See AGREEMENT, 2.

1. A bailee, who has a boat in charge for the purpose of repairing it, is bound to use ordinary diligence in its preservation, and is liable for any damage occasioned by launching the boat into the river at a time and under circumstances of great danger which ought to have been foreseen, and which result in the destruction of the boat, and that, too, although the actual destruction of the boat may not take place until about twelve days after the launching, by the breaking up of the ice. *Smith* v. *Meegan*, 150.

BETTING.

1. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant, on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this state, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the state in congress, said election then and there being authorized by the constitution of the United States and by the laws of this state, is good. *State* v. *Ragan*, 459.
2. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the election was for a probate judge of the county, and was held on a specified day, and was authorized by the laws of the state, is sufficient, the statute showing that the day named was the one fixed by law. *State* v. *Banfield*, 461.

BILL OF EXCEPTIONS.

See PRACTICE, 5, 6.

BILL OF SALE.

See SLAVES, 1, 2, 3. CONVEYANCE, 6.

1. A. owning the legal title to a steamboat, as to one half of which B. is the beneficial owner, made a bill of sale of one half of the said boat to C.; *held*, in a suit by B. against C.'s administrator, for a balance of the purchase money remaining due, that evidence is admissible, to show that the bill of sale was made by A. at the request of B., and was intended by the parties to convey the interest of B. *Bennett* v. *Belt's Adm'r*, 154.

BLOOD.

See DESCENTS AND DISTRIBUTIONS.

BUFFALOES.

1. Buffaloes, although domesticated, are not "cattle" within section 57 of article 3, of the act concerning crimes and punishments. (R. C. 1845, p. 364.) *State* v. *Crenshaw*, 457.

C

CARE.

See NEGLIGENCE. RIGHT OF SUPPORT.

CHARTER.

1. The acceptance by the Pacific Railroad of the act of March 1, 1851, amendatory of its original charter, did not discharge one, who had previously made a subscription to the capital stock of said company, from his obligation to pay calls regularly made upon such subscription; nor did the act of December 25, 1852, (Sess. Acts, 1853, p. 10,) in so far as it fixed the location of the Pacific Railroad. (Renshaw v. Pacific Railroad, 18 Mo. 210, affirmed.) *Pacific Railroad* v. *Hughes*, 291.
2. When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original object of its creation, one who has previously subscribed to the stock of said railroad company can not set up such changes as a defence at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity. *Ib.*
3. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor* v. *Carondelet*, 105.
4. A power to "*annul* a sale" of a lot in the St. Louis common, made under the authority of "an act to authorize the sale of the St. Louis common," approved March 18, 1835, is substantially pursued by declaring the lot "*forfeited* to the city of St. Louis." *Woodson* v. *Skinner*, 13.
5. The seventh section of the above act provided that the "board" of aldermen of the city of St. Louis might, by resolution, &c., "annul" a sale made under the said act, upon the non-payment of interest due; in a deed of the "mayor, aldermen and citizens of the city of St. Louis," dated March 10, 1836, made under said act, a power was reserved to the "mayor and aldermen" to "annul the sale" upon the non-payment of interest: *held*, that it was the intent of the act that the body in

CHARTER—(*Continued.*)

which the legislative power of the city should at the time reside, should annul the sale; that, consequently, a resolution of the city council, consisting of the board of aldermen and board of delegates, (to whom by the act of February 8th, 1839, the legislative power of the city had passed,) approved January 3, 1841, declaring a lot "forfeited to the city of St. Louis, was a good annulment of the sale of said lot." *Ib.*

CITY OF CARONDELET.

See FORFEITURE, 4.

CITY OF ST. LOUIS.

See FORFEITURE, 1, 2. COMMON, 1.

COMMON.

1. The city of St. Louis has a fee simple title to its common, and may, under its charter, pass such a title to a purchaser. *Woodson* v. *Skinner*, 13.

COMMUNITY.

1. The Spanish law superseded the French law in the district of Illinois (afterwards Upper Louisiana) as early as the year 1777. *Cutter* v. *Waddingham*, 206.
2. By the Spanish law prevailing here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law, (as for example the French law,) to regulate their property relations as husband and as wife; as by stipulating for the establishment of a community between the parties according to the custom of Paris. *Ib.*
3. A. and B. being about to marry, entered into a marriage contract, dated August 5th, 1777, containing clauses of which the following is a translation: "The said future spouses to be one and common in all moveable property and immoveable *conquests* (en tous biens meubles, et conquets immeubles), according to the ancient custom established in this colony, to which they submit themselves by force of the present contract;" "the said future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy or otherwise; which property, from whichever side it may come to them, shall enter wholly into community without any reserve." *Held*, that these clauses were ineffectual to bring a lot of one by forty arpens of land in the St. Louis prairie, owned by the husband at the time of the marriage, into a conjugal community, in any such sense, that, on the death of the husband, the wife would be entitled to one half thereof. *Ib.*

CONFLICT OF LAWS.

1. *Semble*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is held subject to a trust must be determined by the law of Illinois. *Pensenneau* v. *Pensenneau*, 27.

CONFLICT OF LAWS—(*Continued.*)

2. By a law of the kingdom of Prussia, the king, upon refunding to the proper owners, under a law of the kingdom, moneys stolen or embezzled by an officer of the post office department, while the same were passing through said department, became subrogated to the rights of said owners against the embezzling officer; *held*, that in case such embezzling officer should abscond from Prussia and come to this state, the king of Prussia may maintain an action against him in the courts of this state. *King of Prussia* v. *Kuepper's Adm'r*, 550.

CONSIGNOR AND CONSIGNEE.

1. P. & A., partners, commission and forwarding merchants in St. Louis, advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. J. S. delivered to P. & A. 386 barrels of lard with the request that it should be "sent forward from New Orleans to Liverpool, provided your (P. & A.'s) correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest." P. & A. made advances upon said lard, and shipped the same to their correspondents in New Orleans, with instructions to ship the same to Liverpool, provided it could be drawn upon so as to cover the advances made to J. S. by P. & A., with charges, &c., otherwise to sell the same in New Orleans. The New Orleans house, not being able to secure advances so as to cover the advances of P. & A., sold the lard, and failed soon after, not having rendered any account of the proceeds. *Held*, in a suit by P. & A. against J. S. to recover the advances made by P. & A., that it should be left to the jury to determine whether it was not the understanding of the parties that J. S. should look to P. & A. for the money arising from the sale of the lard; in short, whether P. & A. were not the agents for the sale of the lard, and those whom they employed, their sub-agents, for whose conduct they are liable. *Pomeroy* v. *Stgerson*, 177.

CONSTITUTIONAL LAW.

See LEGISLATURE, 1. PRACTICE IN CRIMINAL CASES, 6.

CONSTRUCTION.

See CONVEYANCE. AGREEMENT, 2. POLICY OF INSURANCE. EVIDENCE, 12, 13.

CONVERSION.

See TROVER, 1, 2, 3.

CONVEYANCE.

See EQUITY, 1, 2. HUSBAND AND WIFE, 4, 5, 6. BILL OF SALE. ACKNOWLEDGMENT. SLAVES, 1, 2. NOTICE, 1, 2, 3.

1. Where a deed, wanting words of perpetuity, is written on the back of another deed conveying an estate in fee, and contains the following clause—"have sold, ceded, released, and transferred all their part of

CONVEYANCE—(*Continued.*)

the land sold by their co-heirs in the sale above;" *held*, that this reference is not of such a character as to enlarge the life estate conveyed to a fee simple. *Reaume* v. *Chambers*, 36.

2. A deed in which the interest conveyed is described as follows, to-wit: "All the right, title, interest and estate which we or either of us have or may have to a certain tract of land which the said Louis Lemonde, now deceased, but formerly resident, &c., acquired or claimed to have acquired of Auguste Conde, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand prairie, in said county and state, but for which land said parties of the first part have never seen any deed from said Auguste Conde to said Louis Lemonde;" is not void for uncertainty upon its face. *Hogan* v. *Page*, 55.
3. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument or any direct proof of its existence, and which juries are sometimes permitted, and, if the facts warrant, directed to draw, is a disputable presumption and not a conclusive presumption, or *presumptio juris et de jure*. *Dessaunter* v. *Murphy*, 95.
4. Section 3 of the "act regulating conveyances," (R. C. 1845,) does not relate to conveyances of leasehold interests. *Geyer* v. *Girard*, 159.
5. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Ib.*
6. A parol gift of a slave to one for life, remainder to her children, then living, followed by the possession of the donee for life, is valid. *Pemberton* v. *Pemberton*, 138.
7. A conveyance of real estate to W. W. P. & Co., only operates to transmit the legal title to W. W. P. *Arthur* v. *Weston*, 378.

CORPORATIONS.

See MUNICIPAL CORPORATIONS, 1.

1. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond *the* corporate limits. *Wells* v. *City of Weston*, 384.
2. The acceptance by the Pacific Railroad of the act of March 1, 1851, amendatory of its original charter, did not discharge one, who had previously made a subscription to the capital stock of said company, from his obligation to pay calls regularly made upon such subscription; nor did the act of December 25, 1852, (Sess. Acts, 1853, p. 10,) in so far as it fixed the location of the Pacific Railroad. (Renshaw v. Pacific Railroad, 18 Mo. 210, affirmed.) *Pacific Railroad* v. *Hughes*, 291.

CORPORATIONS—(*Continued.*)

3. When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original object of its creation, one who has previously subscribed to the stock of said railroad company can not set up such changes as a defence at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity. *Ib.*
4. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor* v. *Carondelet*, 105.

COSTS.

See PRACTICE, 3. INTEREST, 3.

1. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him. *Neal* v. *Smith*, 349.
2. Where a party prosecuted as a vagrant under the statute, (R. C. 1845,) is discharged, judgment for costs may be given against the informer. *White* v. *Walker*, 433.
3. Where, in an action on a contract, an offer was made by the defendant in writing, under section 1 of article 23 of the practice act of 1849, to allow judgment to be taken against him for a certain sum, which offer was accepted by plaintiff and judgment entered accordingly; *held*, that defendant is not entitled to a judgment for costs, on the ground that the sum for which judgment is thus allowed to be taken is below the jurisdiction of the court. *Lee* v. *Stern*, 575.

COUNTY.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner* v. *Platte County*, 437.

COUNTY COURT.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make

COUNTY COURT—(*Continued.*)

complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane* v. *Todd*, 90.

CRIMES AND PUNISHMENTS.

See PRACTICE IN CRIMINAL CASES. INDICTMENT.

1. Whether a justice of the peace, in improperly issuing a warrant for the arrest of an individual, did the same *maliciously*, is a question for the jury. *State* v. *Allen*, 318.
2. Where, under an indictment under section 38, of article 2, of the act concerning crimes and punishments, (R. C. 1845, p. 351,) the jury render a verdict against the defendant, and assess his punishment at $300; *held*, that it is not erroneous to enter a fine of $500 against the defendant. *State* v. *McQuaig*, 319.
3. As to what constitutes a wounding within section thirty-eight of article two of act concerning crimes and punishments. *State* v. *Leonard*, 499.
4. Buffaloes, although domesticated, are not "cattle" within section 57 of article 3, of the act concerning crimes and punishments. (R. C. 1845, p. 364.) *State* v. *Crenshaw*, 457.

CURTESY.

1. The estate of tenancy by the curtesy is coeval in existence in this state with dower. It was introduced by the territorial act of July 4th, 1807. *Reaume* v. *Chambers*, 36.
2. Where a tenant by the curtesy makes a conveyance, that would, if he were seized in fee, give the grantee an estate for his (grantee's) life, *held*, that the grantee takes an estate for the life of the grantor. *Ib.*
3. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of such grantor, *held*, that so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant by the curtesy. *Ib.*
4. Actual seizin of the wife's land is not necessary to entitle the husband to curtesy. *Ib.*

D

DAMAGES.

See TROVER.

1. Where the damages awarded by the jury are excessive, and unwarranted, the supreme court will award a new trial, if the ends of justice will be subserved thereby. *Goetz* v. *Ambs*, 170.
2. A party, in whipping a female slave, unintentionally but recklessly inflicted blows upon her mistress. In an action by the mistress, *held*, that

DAMAGES—(*Continued.*)

the defendant's liability was not limited to the damages to her *person*; that the jury might take into consideration the mental anguish and wounded feelings of the plaintiff. *West* v. *Forrest*, 338.

3. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie* the amount the paper calls for, though this may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be. *O'Donoghue* v. *Corby*, 393.
4. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance, without a demand. *Rollins* v. *Claybrook*, 405.

DEED OF TRUST.

1. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Geyer* v. *Girard*, 159.

DELIVERY.

See STATUTE OF FRAUDS, 2.

DEMAND.

See TROVER, 1.

1. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance without a demand. *Rollins* v. *Claybrook*, 405.

DEMURRER.

See PLEADING, 5.

DESCENTS AND DISTRIBUTIONS.

1. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that, too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Cutter* v. *Waddingham*, 206.
2. The 12th section of the territorial act of July 4th, 1807, provided that, "There shall be no distinction in the distribution of any intestate's estate between kindred of the whole or half-blood, unless when the inheritance came to the person so seized, by descent, devise or gift of

DESCENTS AND DISTRIBUTIONS—(*Continued.*)

some one of his or her ancestors; in which case all those who are not *of the blood* of such ancestors shall be excluded from such inheritance." *Held*, 1st, that the words "of the blood" exclude only those who have *none* of the blood of the ancestor from whom the estate came, without reference to proportion or quantity; 2d, that all such as have none of the blood are entirely excluded; as where an estate came direct to the intestate from his father, brothers of the half-blood on the one side of the mother being in that case entirely excluded from the inheritance; 3d, that this exclusion is limited to an exclusion of those who are not of the blood of the immediately antecedent ancestor; as where an estate has passed by descent to two brothers, and upon the death of one brother his half has passed to the other, the intestate, the half-brothers of such intestate on the side of the mother are not excluded from inheriting that portion of the estate that came to the intestate from his deceased brother. *Ib.*

DILIGENCE.

See NEGLIGENCE.

DOWER.

See CURTESY, 1, 2, 3, 4.

1. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. (LEONARD, J., dissenting.) *Lee* v. *Lindell*, 202; *Sire* v. *City of St. Louis*, 206.

E

EJECTMENT.

1. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of such grantor, *held*, that so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant by the curtesy. *Reaume* v. *Chambers*, 36.

ENUREMENT.

1. A. claiming under B. presented to the old board of commissioners, May 23, 1808, for confirmation, a claim to a lot of one by forty arpens. He however produced before the board no evidence of any kind showing a derivative title from B. The board, in confirming the claim, use the following language: "The board grant to the representatives of B. the lot and order a survey," &c. *Held*, that this is not a confirmation of the lot to A.; that, in order that the confirmation may enure to the benefit of A., he must show a derivative title from B. *Hogan* v. *Page*, 55.
2. C. M. having a Spanish concession and survey, died in 1802, leaving five children, and a widow, who afterwards married one J. M. C. J. M. C. claiming to be the representative of C. M., (whose widow, he

ENUREMENT—(*Continued.*)

stated in the notice of claim presented by him, he had married,) presented the claim for confirmation to the old board of commissioners; but made no proof whatever of any derivation of title from C. M. to himself. The board, October 9, 1810, confirmed the claim to C. M. *Held*, that this confirmation was not void, but enured to the benefit of the representatives of C. M. It did not enure to the benefit of J. M. C. (Hogan v. Page, ante, affirmed.) *Mercier* v. *Letcher*, 66.

3. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Geyer* v. *Girard*, 159.

EQUITY.

See FRAUDULENT CONVEYANCE, 1. PLEADING, 6.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane* v. *Todd*, 90.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Speck* v. *Wohlten*, 310.
3. A. B. and C. (A. and B. having husbands living) owning land in coparcenary, an amicable partition is made and equal shares allotted to each; in making the mutual conveyances to complete and perfect the partition, B. and husband and C. convey to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. are so acknowledged as to pass only the life interest of the husband: *held*, in a suit by A. against the heirs of her deceased husband, that there is no equity in her favor to obtain a devestiture of the title that descended to the defendants from the husband of plaintiff. *Pensenneau* v. *Pensenneau*, 27.
4. *Semble*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is

EQUITY—(*Continued.*)

held subject to a trust must be determined by the law of Illinois. *Ib.*

5. A court of equity never lends its aid to enforce a forfeiture. *Messersmith* v. *Messersmith*, 369.
6. Where there is a breach of an express condition in a deed, the remedy of the grantor is by an entry and a suit at law, if necessary, to recover the possession; and the remedy of the grantee, or his heirs, is by a suit in equity to be relieved against the forfeiture upon making a just compensation, if a proper case for equitable relief exists, or perhaps by setting up this matter as a defence when sued at law for the possession. *Ib.*
7. A mother conveyed land to her son, upon an express condition inserted in the deed, that he should provide for her maintenance during her natural life. The son having maintained his mother many years, died without making any express provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose; *held*, that if there was any breach of the condition, it was a proper case for equitable relief against a forfeiture. *Ib.*
8. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing the same. *Goode* v. *Goode*, 518.

ESTOPPEL.

See LIMITATION OF ACTIONS, 3.

EVIDENCE.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey* v. *Evans*, 157.
2. A certified copy from the record of a memorandum of sale, not a Spanish archive, executed December 26, 1786, and not recorded before the year 1811, may, under the "act concerning evidence," (R. C. 1845, p. 469, 470,) be read in evidence only upon proof of such facts and circumstances as, together with the certificate of acknowledgment or proof, will satisfy the court that the person who executed the instrument is the person therein named as grantor. *Aubuchon* v. *Murphy*, 115.
3. A. owning the legal title to a steamboat, as to one half of which B. is the beneficial owner, made a bill of sale of one half of the said boat to C.; *held*, in a suit by B. against C.'s administrator, for a balance of the purchase money remaining due, that evidence is admissible, to show that the bill of sale was made by A. at the request of B., and was intended by the parties to convey the interest of B. *Bennett* v. *Belt's Adm'r*, 154.
4. Where evidence rejected is of too vague and indecisive a character to produce any effect on the finding of the facts by the court, the supreme

EVIDENCE—(*Continued.*)

court will not reverse the judgment of the court below. *Conrad* v. *Bell's Adm'r*, 166.

5. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r* v. *Luce*, 168.
6. In suits commenced under the old system of practice, the rules of evidence, as they then existed, will govern in ascertaining the competency of a witness. *Pomeroy* v. *Sigerson*, 177.
7. A letter written by the party sought to be charged as principal, not denying his liability, but regretting his inability to meet the demand, is evidence sufficient to sustain a finding by a jury of the fact of agency, although written in answer to a letter falsely stating that he had signed the note. *Higgins* v. *Dellinger*, 397.
8. Where a written memorandum of a contract of sale does not purport to be a complete expression of the entire contract, and is uncertain as to the property sold, this may be designated by parol evidence. *Rollins* v. *Claybrook*, 405.
9. The admissions of a constable, forming no part of the *res gestæ*, are not evidence against his securities. *State* v. *Bird*, 470.
10. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother by giving evidence in a former judicial proceeding that she had had an illegitimate child before her marriage with plaintiff's father. *Grider* v. *Dent*, 490.
11. In impeaching a witness, evidence of his general character for truth and veracity, among a *majority* of his neighbors, is inadmissible. *Amory* v. *Phillips*, 499.
12. A., a member of a firm composed of A., B. and C., sold out to B. and C.; and the latter, with D. and E. as securities for the performance of their obligation, assumed to pay the debts of the partnership, and in particular a note for $488 18, due from the partnership. B. and C. failed to pay said note, and A. having paid a judgment recovered thereon in the state of Iowa against himself and his co-partners, brought a suit against D. and E. for indemnification. *Held*, that the entire correspondence between the note set out in plaintiff's petition and that described in a transcript of the record and proceedings in the Iowa suit, would warrant the court in finding that the notes described were the same note. *Wilbur* v. *Clark*, 503.
13. By the statute law of this state (see sess. acts, 1841, p. 86; R. C. 1845, p. 1077,) a "ton" of hemp is 2000 pounds avoirdupois and not 2240 pounds. *Green* v. *Moffett*, 529.
14. Evidence to the effect that by custom or mercantile usage a "ton" of hemp consists of 2240 pounds instead of 2000 pounds, is not admissible in the interpretation of contracts. *Ib.*
15. Where a dray ticket, containing an acknowledgment of the receipt of

EVIDENCE—(*Continued.*)

goods to be transported, also a statement of the rate of freight thus—"30 cents per 100 lbs.," is signed by a clerk of a steamboat; *held*, in a suit against the boat, that such a dray ticket is not conclusive as to the rate of freight; that the words "30 cents per 100 lbs." may be shown to have been inserted by fraud, mistake or surprise, and consequently did not express the intention of the parties. *Wood* v. *Steamboat Fleetwood*, 560.

16. Where in a suit against a keeper of a livery stable to recover damages for injuries sustained in consequence of the negligent driving of a carriage of defendant by one of his servants, testimony was offered on the part of defendant to show that the general character of the driver was that of a prudent and careful driver; *held*, that such testimony was properly excluded. *Boggs* v. *Lynch*, 563.

F

FINDING OF FACTS.

See PRACTICE, 7, 15. SUPREME COURT.

1. To induce the supreme court to interfere with the finding of the facts by the lower court, such finding must be clearly wrong; it is not sufficient that, from the evidence, the finding might have been different; it must be a strong case. *Conrad* v. *Belt's Adm'r*, 166.
2. Where a cause is tried by the court sitting as a jury, the finding of the facts should warrant the conclusion of law declared by the court and the judgment rendered; in reviewing the law of a case upon the facts found, the supreme court will not, from the facts, as found, infer or declare the existence of other facts. *Pearce* v. *Burns*, 577; *Pearce* v. *Roberts*, 582.

FORCIBLE ENTRY AND DETAINER.

1. In an action of forcible entry and detainer, where the defence relied on is that the entry complained of was made after an abandonment of the premises by the plaintiffs; *held*, that evidence offered by defendants to the effect that previous to the alleged abandonment and the forcible entry complained of, the plaintiffs, then being tenants of one W. C. (claiming under whom the defendants made their entry) fraudulently attorned to one J. M., is inadmissible. *Keyser* v. *Rawlings*, 126.
2. Where, in an action of forcible entry and detainer, one of two co-plaintiffs, who had, previous to the entry complained of, been in joint possession of the premises entered upon, dies, the survivor may recover all the damage sustained by such forcible entry and detainer. *Ib.*
3. *Quere.* Whether the estate of the deceased co-plaintiff is not entitled, in such case, to one half the sum recovered. *Ib.*

FORECLOSURE.

1. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles* v. *Smith*, 502.

FOREIGN SOVEREIGN, OR STATE.

1. A foreign sovereign may maintain an action against a citizen of this state in the courts of this state. *King of Prussia* v. *Kuepper's Administrator*, 550.
2. By a law of the kingdom of Prussia, the king, upon refunding to the proper owners, under a law of the kingdom, moneys stolen or embezzled by an officer of the post office department, while the same were passing through said department, became subrogated to the rights of said owners against the embezzling officer; *held*, that, in case such embezzling officer should abscond from Prussia and come to this state, the king of Prussia may maintain an action against him in the courts of this state. *Ib.*

FORFEITURE.

1. A power to "*annul* a sale" of a lot in the St. Louis common, made under the authority of "an act to authorize the sale of the St. Louis common," approved March 18, 1835, is substantially pursued by declaring the lot "*forfeited* to the city of St. Louis." *Woodson* v. *Skinner*, 13.
2. The seventh section of the above act provided that the "board" of aldermen of the city of St. Louis might, by resolution, &c., "annul" a sale made under the said act, upon the non-payment of interest due; in a deed of the "mayor, aldermen and citizens of the city of St. Louis," dated March 10, 1836, made under said act, a power was reserved to the "mayor and aldermen" to "annul the sale" upon the non-payment of interest: *held*, that it was the intent of the act that the body in which the legislative power of the city should at the time reside, should annul the sale; that, consequently, a resolution of the city council, consisting of the board of aldermen and board of delegates, (to whom by the act of February 8th, 1339, the legislative power of the city had passed,) approved Jan'y 3, 1841, declaring a lot "forfeited to the city of St. Louis, was a good annulment of the sale of said lot." *Ib.*
3. There is a marked difference between a forfeiture imposed by a statute and one arising under the contract of parties. In the one case it can not be relieved against; in the other, it may. *Ib.*
4. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor* v. *Carondelet*, 105.

FRAUD.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should be actually made to the maker of the note himself; any false and fraudulent representations held out and made to the world at large for purposes of deception, as by the public statement of the condition of the company, and relied upon by the maker of the note, will constitute a good defence. *City Bank* v. *Phillips*, 85.
2. Where a dray ticket, containing an acknowledgment of the receipt of goods to be transported, also a statement of the rate of freight thus—"30 cents per 100 lbs.," is signed by a clerk of a steamboat; *held*, in a suit against the boat, that such a dray ticket is not conclusive as to the rate of freight; that the words "30 cents per 100 lbs." may be shown to have been inserted by fraud, mistake or surprise, and consequently did not express the intention of the parties. *Wood* v. *Steamboat Fleetwood*, 560.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See JUDGMENT, 1.

1. A. makes a fraudulent conveyance of land. A judgment is subsequently recovered against him, and the land is sold under an execution, and B. becomes the purchaser, who afterwards conveys back to A., who then conveys to C., who has notice of the facts. *Held*, that as A. could not have obtained equitable relief against his fraudulent deed, neither can his grantee with notice. *Perry* v. *Calvert*, 361.

G

GIFT.

See SLAVES, 1, 2, 3.

H

HEAD OF A FAMILY.

1. A married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace is disturbed, in an indictment under section 15 of article 7 of the act concerning crimes and punishments (R. C. 1845). *State* v. *Slater*, 464.

HUSBAND AND WIFE.

See MARRIAGE CONTRACT, 1. COMMUNITY.

1. *Lindell* v. *McNatr*, (4 Mo. 380,) explained and affirmed. The case of *Lindell* v. *McNatr* merely decided that a conveyance, executed by hus-

HUSBAND AND WIFE—(*Continued.*)

band and wife, after January 19, 1816, (the date of the introduction of the common law) and before June 22, 1821, (the date of the "act to enable husband and wife to convey real estate belonging to the wife,") in conformity to the statute law then in force, regulating conveyances and the relinquishment of dower interests, was effectual to convey real estate belonging to the wife. After the introduction of the common law, the Spanish law had no force here. *Reaume* v. *Chambers*, 36.

2. In order that a deed of a married woman may effectually convey her estate, the requirements of the law must be complied with. If it appear from the face of the deed that the deed has not been executed in the manner required by law, there can be no presumption of its proper execution as against her. *Ib.*
3. A deed executed November 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri. *Ib.*
4. A right of entry or of action for the possession of land may accrue to a married woman. A married woman having a right of entry which accrued before December 1st, 1835, may bring her action within twenty years after becoming discovert. *Ib.*

I

IMPEACHING A WITNESS.

See WITNESS 1.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

1. Where a justice of the peace is indicted for misdemeanor in office, it is not necessary that the prosecutor's name should be endorsed on the indictment. *State* v. *Allen*, 318.
2. Where, under an indictment under section 38, of article 2, of the act concerning crimes and punishments, (R. C. 1845, p. 351,) the jury render a verdict against the defendant, and assess his punishment at $300; *held*, that it is not erroneous to enter a fine of $500 against the defendant. *State* v. *McQuaig*, 319.
3. It lies in the discretion of the court, whether it will compel the State to elect the count of an indictment on which the defendant shall be tried. (State v. Jackson, 17 Mo. 544, affirmed.) *State* v. *Leonard*, 449.
4. An indictment, under the 38th section of article 2 of the act concerning crimes and punishments, (R. S. 1845, p. 351,) which charges that the defendant feloniously assaulted and wounded M. D., wife of D. D., with a large stone held in his hand, &c., alleged to have been a deadly weapon likely to produce great bodily harm and death, and her the said M. D. did then and there strike, beat, wound, and ill-treat with

INDICTMENT—(*Continued.*)

great force, which was likely to produce death, &c., is sufficient. The words "with intent her the said M. D. then and there to wound and ill-treat," may be rejected as surplusage. *Ib.*

5. An indictment, under section 57 of art. 3 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant "did unlawfully, wilfully, maliciously and feloniously kill a *certain horse beast*, to-wit, *one mare*, then and there the property of one A. B.," &c., is sufficient. Courts will take judicial notice, that horses are included in the term "cattle," as used in that section. *State* v. *Hambleton*, 452.
6. In such an indictment, it is not necessary to charge malice against the owner of the animal killed, nor to state the manner of killing. *Ib.*
7. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant, on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this state, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the state in congress, said election then and there being authorized by the constitution of the United States and by the laws of this state, is good. *State* v. *Ragan*, 459.
8. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the election was for a probate judge of the county, and was held on a specified day, and was authorized by the laws of the state, is sufficient, the statute showing that the day named was the one fixed by law. *State* v. *Banfield*, 461.
9. An indictment under the 37th section of the 2d article of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendants (Y. & Y.) "on, &c., at, &c., upon the body of one J. M. J., then and there being, and assault did then and there unlawfully and feloniously make, and the said Y. & Y., with sticks, rocks, stones and knives, then and there, being deadly weapons, &c., in and upon the head, face and body of him, the said J., then and there did assault and beat, with the intent him, the said J., then and there feloniously to kill, contrary," &c., is good. *State* v. *York*, 462.
10. A married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace is disturbed, in an indictment under section fifteen of article seven of the act concerning crimes and punishments (R. C. 1845). *State* v. *Slater*, 464.
11. An indictment of a road overseer for failing to keep his road in repair, under the act concerning roads and highways, (R. C. 1845,) must state, in terms or in substance, that the failure was wilful. *State* v. *Levens*, 469.

INTEREST.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner* v. *Platte County*, 437.
2. Where, in a suit commenced in the year 1847, while the act of January 15, 1847, (sess. acts, 1847, p. 63,) regulating the interest of money, was in force, the jury found that the interest reserved—ten per cent. —exceeded the lawful rate of interest by four per cent.; *held*, that the court committed no error in deducting from the principal of the note the interest upon the same at four per cent. for the whole time the note was running, that is, from its date to the date of the judgment, and in giving judgment for plaintiff for the balance only of the principal. *Mitchell* v. *Griffith*, 515.
3. Nor is it error in such a case to give judgment against plaintiff for costs. *Ib.*

J

JUDGMENT.

See PRACTICE, 3.

1. A. having purchased certain lots in the city of St. Louis at an execution sale under judgments against B., brought suit against B. and also against C., in whom the legal title to said lots stood, asking that the title of C. might be divested and transferred to A. on the ground that the said lots had been conveyed to C. with intent to defraud the creditors of B. (of whom A. was one), and were thus fraudulently held by C. To this suit both defendants appeared, and B., in his answer, denied the fraud alleged, denied ownership in himself, and asserted full ownership in C. The court gave judgment for A., plaintiff, and by its decree vested the title to said lot in him free, and discharged of all claims in favor of either B. or C. *Held*, that this suit was a complete and final adjudication upon the title of B. to the lots in question, and that B. could not afterwards set up title thereto, either in his own behalf, or in behalf of his creditors, on the ground that A. acquired the property by making a fraudulent use of a judgment confessed by B. in his favor: the matter is *res adjudicata*. *Franklin* v. *Stagg*, 193.

JUDGMENT BY DEFAULT.

See PRACTICE, 6, 7, 14.

JUDICIAL SALE.

1. A contract in consideration of refraining from bidding at a judicial sale is void. *Hook* v. *Turner*, 333.

JURISDICTION.

See JUSTICE OF THE PEACE, 1. LAND COURT, 1.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane* v. *Todd*, 90.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Speck* v. *Wohlten*, 310.
3. Where the amount of damages claimed by the plaintiff in a suit before a justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may in the justice's court enter a *remittitur* for the excess recovered beyond the justice's jurisdiction, he can not be permitted to do this in the circuit court on appeal, so as to give jurisdiction. *Batchelor* v. *Bess*, 402.
4. If, in order to authorize the supreme court to reverse a judgment, in a case commenced before a justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court; this is sufficiently shown by a motion for a review in which the objection is made, although a motion for a review is not applicable in such a case. *Ib.*

JUROR.

1. The rejection by the court trying a cause of a competent juror is no ground for reversal in the supreme court, there being no valid objection to the jurors empannelled. *West* v. *Forrest*, 344.

JURY.

See CRIMES AND PUNISHMENTS, 1.

1. The separation of a jury, in a criminal case, (an indictment for an assault with intent to kill,) after having written down and sealed their verdict and delivered the same to the officer in charge of them, though without consent and without the order of court, is not such misconduct as will authorize the supreme court to reverse and remand the cause. *State* v. *Weber*, 321.

JUSTICE OF THE PEACE.

1. A justice of the peace has jurisdiction of a suit to recover the balance of the purchase money of land, where the credits allowed bring the amount claimed within the sum for which the justice can entertain suits. *Musick* v. *Chamlin*, 175.

JUSTICES' COURTS.

See JUSTICE OF THE PEACE. JURISDICTION, 3, 4.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight* v. *Crinnion*, 559.
2. The list of delinquents, which the road overseer is required to place in the hands of the justice, (R. C. 1845, tit. Roads and Highways, art. 1, § 45,) is for the information and government of the justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary. *Slover* v. *Muncy*, 391.
3. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Ib.*

L

LAND COURT.

1. Whenever by the rules of equity a party is entitled to have a right to land vested in him, the remedy may be had, in St. Louis county, in the Land Court. *Speck* v. *Wohlien*, 310.

LANDS AND LAND TITLES.

See COMMON, 1. COMMUNITY.

1. A. claiming under B. presented to the old board of commissioners, May 23, 1808, for confirmation, a claim to a lot of one by forty arpens. He however produced before the board no evidence of any kind showing a derivative title from B. The board, in confirming the claim, use the following language: "The board grant to the representatives of B. the lot and order a survey," &c. *Held*, that this is not a confirmation of the lot to A.; that, in order that the confirmation may enure to the benefit of A., he must show a derivative title from B. *Hogan* v. *Page*, 55.
2. C. M. having a Spanish concession and survey, died in 1802, leaving five children, and a widow, who afterwards married one J. M. C. J.

LANDS AND LAND TITLES—(*Continued.*)

M. C. claiming to be the representative of C. M., (whose widow, he stated in the notice of claim presented by him, he had married,) presented the claim for confirmation to the old board of commissioners; but made no proof whatever of any derivation of title from C. M. to himself. The board, October 9, 1810, confirmed the claim to C. M. *Held*, that this confirmation was not void, but enured to the benefit of the representatives of C. M. It did not enure to the benefit of J. M. C. (Hogan v. Page, ante, affirmed.) *Mercier* v. *Letcher*, 66.

LEASES.

See FORFEITURE, 1, 2, 3, 4. DEED OF TRUST, 1.

LEGISLATURE.

1. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells* v. *City of Weston*, 384.

LIMITATION OF ACTIONS.

1. A right of entry or of action for the possession of land may accrue to a married woman. A married woman having a right of entry which accrued before December 1st, 1835, may bring her action within twenty years after becoming discovert. *Reaume* v. *Chambers*, 36.
2. Where in an action for the possession of land, the defence relied on is the statute of limitations, and the court finds that in the year 1818, one B., under whom defendant claimed, took possession of the tract sued for, under a deed of conveyance of the same, and let it out to various tenants at various times after the date of the purchase, until his death; that at all times since his purchase, B., and since his death his representatives have claimed the said land and exercised ownership over it, by entering upon it, by cutting timber and wood upon it, by prosecuting others for trespasses to the land, and by constantly having an agent living near the land with authority to superintend and protect it, and rent it out, and by regularly paying the taxes; that these successive possessions were actual, continuous, and adverse to the plaintiff and those under whom he claimed; *held*, that these facts found by the court warranted a judgment for defendant, notwithstanding it was also found that the land sued for was not used as a homestead or dwelling, and that during B.'s claim the land was often untenanted and uncultivated, sometimes for several years at a time; that at such times the fences were thrown down or destroyed, and the land lay open. (SCOTT, J., dissenting.) *Menkens* v. *Ovenhouse*, 70.
3. Where parties have been under disabilities so that their title to land, held adversely, has not been barred by the operation of the statute of limitations; *held*, that their failure to object to the adverse occupation, and to the making of improvements, &c., will not estop them from setting up title. *Dessaunier* v. *Murphy*, 95.

LIMITATION OF ACTIONS—(*Continued.*)

4. Where A. conveys to B. contiguous lots, by separate granting words, descriptions, and habendums, and B. builds a house upon one of the lots, and makes an enclosure about the same, and accidentally, through mistake or ignorance of the boundaries, and without any design of taking possession of it, extends the enclosure over upon the other lot, so as to embrace a small portion of said lot; *held*, that this is not a possession within the meaning of our statute of limitations; although the actual detention—"*pedis possesio*"—exists; there is wanting the intention on the part of the possessor, which is necessary to constitute a civil possession. *Cutter* v. *Waddingham*, 206.
5. *Quere*—Whether one who has taken possession of a small portion of a larger lot or tract of land, under a deed, not of the lot, but merely of whatever interest the grantor may be found to have in it, has, without any thing more, a possession extending over the whole lot, within the meaning of our statute of limitations. *Ib.*
6. The exception in section 7 of article 2 of the statute of limitations of 1845, does not apply where the debtor is a *non-resident* of the state when the cause of action accrues, but only where, being a resident, he is absent. *Thomas* v. *Black*, 330.
7. The rule of the common law, embodied in the maxim "*nullum tempus occurrit regi*," and adopted generally in this country, applies only to the state at large, and not to the political subdivisions thereof. The statute of limitations runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the state, as against private individuals. The immunity was at common law an attribute of sovereignty only. *County of St. Charles* v. *Powell*, 525.
8. The sums received by the several counties of this state out of the "road and canal fund" under the several acts of the general assembly, (see R. C. 1835, p. 553; Sess. Acts, 1836–7, p. 108–9,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the said counties on bonds executed in their favor by persons to whom portions of said fund had been loaned. *Ib.*
9. The fact that the obligor of such a bond becomes a judge of the county court, before the time of the limitation, ten years, expires, will not deprive him of right to set up the statute as a bar to a recovery. *Ib.*

LOSS OR DESTRUCTION OF INSTRUMENTS.

1. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r* v. *Luce*, 168.

M

MALICE.

See INDICTMENT, 6.

1. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Hudson* v. *Garner*, 423.

MALICIOUS KILLING.

See INDICTMENT, 5.

MARRIAGE CONTRACT.

See COMMUNITY, 2, 3.

1. A stipulation in a marrriage contract to the effect that in case the wife should survive the husband, she should receive from the estate of the husband the sum of $200, is valid; such an instrument is not a testamentary disposition, but creates a legal liability in favor of the wife, and she may bring suit on the same after the decease of her husband, against his representatives. *Vogel* v. *Vogel's Adm'r*, 161.

MASTER AND SERVANT.

See EVIDENCE, 15.

1. Where one employs a person, carrying on a distinct trade or calling, to perform certain work for him, the employee being independent of the control of the employer, the latter is not responsible for any injury to third persons caused by the negligence of the employee or his workmen. *Morgan* v. *Bowman*, 538.
2. Where, however, the one employed to superintend the work to be done, is subject to the control of his principal, and is paid for his services by day wages, the principal is responsible for injuries to third persons caused by such employee or his servants. *Ib.*

MEASURE OF DAMAGES.

See DAMAGES, 2, 3.

MECHANIC'S LIEN.

See AGREEMENT, 6, 7.

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien. *Gorman* v. *Sagner*, 137.
2. Where a *scire factas* to enforce a mechanic's lien is issued against the contractor who built the building against which the lien is claimed, and also against the owners thereof, and it appears on the trial that plaintiffs had not given the notice of the claim of lien to plaintiffs with-

MECHANIC'S LIEN—(*Continued.*)

in the time required by statute, the owners, however, not contesting in their answer the validity of the lien, on the ground of the want of the requisite thirty days' notice, and not excepting to any act of the court during the progress of the trial, and making no motion in arrest of judgment or for a new trial; *held*, that the contractor can not be permitted to attack the validity of the lien on the ground of a want of timely notice, though he may contest the plaintiffs' demand, so far as the validity and extent of the debt is concerned. *Clark* v. *Brown*, 140.

3. Under § 3 of act of February 24, 1843, (see Sess. Acts, 1843, p. 83,) which provided that "every person who wishes to avail himself of the benefit of the preceding sections, shall give notice to the owner, owners, or agent, within thirty days after the indebtedness accrued, or the completion of the building or improvement," &c.; *held*, that one who gives notice of his claim of lien for materials furnished, more than thirty days after the indebtedness for such materials accrues, has lost his lien by his delay, although such notice may have been given within thirty days after the completion of the buildings. (SCOTT, J., dissenting.) *Patrick* v. *Ballentine*, 143.

MORTGAGE.

1. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles* v. *Smith*, 502.
2. An understanding between vendor and vendee, entered into at the time of sale of land, (being a parol sale under which possession is taken,) that if within a year the former should repay to the latter the purchase money, with interest, then the latter would reconvey to the former, constitutes the transaction a mortgage. *Tibeau* v. *Tibeau*, 77.

MOTION.

See SUPREME COURT, 6.

MUNICIPAL CORPORATIONS.

See LIMITATION, 7.

1. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor* v. *Carondelet*, 105.

MUNICIPAL CORPORATIONS—(*Continued.*)

2. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells* v. *City of Weston*, 384.

N

NEGLIGENCE.

1. A bailee, who has a boat in charge for the purpose of repairing it, is bound to use ordinary diligence in its preservation, and is liable for any damage occasioned by launching the boat into the river at a time and under circumstances of great danger which ought to have been foreseen, and which result in the destruction of the boat, and that, too, although the actual destruction of the boat may not take place until about twelve days after the launching, by the breaking up of the ice. *Smith* v. *Meegan*, 150.
2. Where excavations are made upon one of two contiguous lots, the proprietor making the same will be responsible for all damage caused to buildings or other property upon the adjoining lot by reason of such excavation having been negligently made. *Charless* v. *Rankin*, 566.
3. It is however erroneous to rule that the proprietor having the excavating done is bound to use such care and caution as a prudent man, experienced in such work, would have exercised, if he had himself been the owner of the injured building. Such a ruling tends to mislead, as one who is proprietor of both the contiguous lots might very prudently subject himself to expense and inconvenience for the protection of his building, that could not justly be imposed upon one making excavations upon an adjoining lot belonging to him. *Ib.*
4. The excavator can not set up as a defence that he used such care as his builder and superintendent, a skillful and careful person, deemed necessary. The decisive question is, whether there was actual negligence in making the excavation. *Ib.*
5. Any negligence in the performance of what is lawful which causes loss to another, is an injury which confers a right of action. *Morgan* v. *Cox*, 373.
6. The reasonable care which persons are bound to take in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous, is bound to use more than ordinary care. *Ib.*
7. Where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions, as where one by the negligent handling of a loaded gun kills another's slave, it is no defence, it would seem, that the act occurred through inadvertence, or without the wrong-doer's intending it; it must appear that the injury

NEGLIGENCE—(*Continued.*)

done was *inevitable*, and utterly without fault on the part of the alleged wrong-doer. *Ib.*

NEW TRIAL.

See PRACTICE.

1. On a motion for a new trial on the ground of newly discovered evipence, the affidavit of the party to the suit will not itself suffice; the affidavit of the new witness must be produced or its absence accounted for. *Boggs* v. *Lynch*, 563.

NOTARY PUBLIC.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight* v. *Crinnion*, 659.

NOTICE.

See PROMISSORY NOTES, 2. MECHANIC'S LIEN, 2, 3. PRACTICE, 3.

1. Possession of real property under an unrecorded deed is not, as a matter of law, *actual notice* to a subsequent purchaser, within the meaning of our registry act. *Vaughn* v. *Tracy*, 415.
2. But a majority of the court are of opinion that it is *evidence* of notice, to be submitted to a jury. *Ib.*
3. The *actual notice* required by the registry act is not *certain knowledge*, but such information as men generally act upon in the transactions of life. *Ib.*

P

PARENT AND CHILD.

1. Where a step-son continues to reside in the family of his step-father after coming of age, as before, the law will not imply a contract to pay him for services rendered. *Guenther* v. *Birkicht's Adm'r*, 439.

PARTIES.

See PLEADING.

PARTITION.

1. A. B. and C. (A. and B. having husbands living) owning land in coparcenary, an amicable partition is made and equal shares allotted to each; in making the mutual conveyances to complete and perfect the partition, B. and husband and C. convey to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. are so acknowledged as to pass only the life interest of the husband: *held*, in a suit by A. against the heirs of her deceased husband,

PARTITION—(*Continued.*)

that there is no equity in her favor to obtain a devestiture of the title that descended to the defendants from the husband of plaintiff. *Pensenneau* v. *Pensenneau*, 27.

2. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. (LEONARD, J., dissenting.) *Lee* v. *Lindell*, 202; *Sire* v. *City of St. Louis*, 206.

PARTNERSHIP.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey* v. *Evans*, 157.
2. An arrangement between forwarding and commission merchants in St. Louis, and their correspondents in New Orleans, that on all sales of produce shipped by the St. Louis house to that in New Orleans, one per cent. of the usual commission of 2½ per cent. should be returned to the St. Louis house, does not constitute the two houses partners. *Pomeroy* v. *Sigerson*, 177.
3. A conveyance of real estate to W. W. P. & Co., only operates to transmit the legal title to W. W. P. *Arthur* v. *Weston*, 378.
4. Where, in a case of the death of one of two partners, the survivor gives the bond required by the 50th and 51st sections of the first article of the administration act (R. C. 1845, p. 70), with approved securities; *held*, that such survivor can not be removed by the probate court and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident of the state. *Green's Adm'r* v. *Virden*, 506.

PLEADING.

See PRACTICE. INDICTMENT.

1. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Hudson* v. *Garner*, 423.
2. Where a suit is brought to enforce a trust, with reference to specific property, and the plaintiff prays a devestiture of title; and also prays that, if the court should refuse the first prayer, the rights of plaintiff and also of defendants may be ascertained and a partition and division decreed accordingly: *held*, that the alternative relief prayed is founded on the assumption that the cause of action is wholly misconceived, and should not be granted. A plaintiff can not ask in his petition, that, if he should have mistaken his remedy, and should fail to obtain the relief prayed, another and a different cause of action may be tried. *Pensenneau* v. *Pensenneau*, 27.
3. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land,

PLEADING—(*Continued.*)

although he does not set it up in his answer, but simply denies the contract. *Hook* v. *Turner*, 333.

4. A note is executed to three partners, two of whom upon a settlement of the partnership affairs, for value, sell and transfer by delivery their interest in the note to the third. *Held*, that the third might sue on the note in his own name. *Canefox* v. *Anderson*, 347.
5. Where a party is in possession of a store, as a clerk or agent of another, his possession is that of his principal. *Coggburn* v. *Simpson*, 351.
6. Where a statute creates an absolute bar by the mere lapse of time, without any exception, the defence may be made by demurrer, if the necessary facts appear in the petition. *State* v. *Bird*, 470.
7. Where a slave is conveyed to a trustee to be held in trust for the use of a married woman for life, (she being entitled by the deed of conveyance to the possession of the slave,) and upon her death for the use of the children; *held*, that the wife can not in her own name and that of her husband maintain an action for the conversion of the slave. An action for the protection of the legal ownership should be brought in the name of the trustee, or in case of his death or refusal to act, or the existence of any obstacle to the ordinary legal remedy, a proper case for equitable relief might be made and such relief furnished. *Richardson* v. *Means*, 495.
8. Where in a petition it was charged that the defendant, "without leave and wrongfully entered upon a certain tract of land (describing it) of which plaintiffs were the owners and in possession thereof, &c., and took from said premises a house thereon situated, used and employed as a Methodist meeting-house or church, and carried said house off," &c.; *held*, that an answer, in which defendant "denies that he wrongfully entered upon the premises and took therefrom a Methodist church or meeting-house of said plaintiffs; and the defendant charges the fact to be, that the house spoken of, was his (defendant's) property and not owned or claimed by plaintiffs," (defendant also in the answer claiming permission from one of the plaintiffs to "do as he pleased with" said house, and denying plaintiff's possession,) admits the entering and taking away of the house. *Emory* v. *Phillips*, 499.
9. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles* v. *Smith*, 502.
10. *Quere*, as to the soundness of the doctrine laid down in Wood v. Steamboat Fleetwood, (19 Mo. 529,) that an allegation of the value of property claimed by plaintiff, or alleged to have been destroyed, &c., by defendant, is not admitted if not denied. *Morgan* v. *Bowman*, 538.

POLICY OF INSURANCE.

1. Where a policy of insurance, in which *fire* and *ice* are excepted perils, is renewed by an endorsement in which it is stated that it is "understood that the assured is not entitled to claim for any loss or damage

POLICY OF INSURANCE—(*Continued.*)

arising from *tce*;" *held*, that a second renewal by endorsement, in which it is stated that the "within policy is renewed," &c., applies to the original policy and not to the said policy as renewed by the first endorsement. A loss by fire occurring after the second renewal is not covered by the policy. *Honich* v. *Phœnix Insurance Co.*, 82.

POSSESSION.

See SLAVES, 1, 2, 3. NOTICE, 1, 2, 3. LIMITATION OF ACTIONS, 2, 4, 5. CONVEYANCE. PRINCIPAL AND AGENT, 1, 2.

POWER.

See FORFEITURE, 1, 2. LEGISLATURE, 1. COMMON, 1. AGREEMENT, 4.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee* v. *Agee's Adm'r*, 366.

PRACTICE.

See SUPREME COURT. COSTS, 3. ACTION FOR DELIVERY OF PERSONAL PROPERTY. EVIDENCE, 5. RECOGNIZANCE, 3.

1. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r* v. *Luce*, 168.
2. Where an appeal is taken from a justice of the peace in a proceeding under the landlord and tenant act, and the transcript is filed by the justice in the land court; *held*, that it is error to dismiss the appeal on motion of the appellee, on the ground that the recognizance stated the appeal to be to the law commissioner's court, a motion for leave to amend the recognizance having been made before the motion to dismiss was disposed of. The court should have permitted appellant to file a good and sufficient recognizance. *Matthews* v. *Gloss*, 169.
3. Where a new trial is granted on the motion of defendant, on condition that defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment (as by giving judgment for the possession of land, in accordance with the verdict of the jury, where, through inadvertence, a judgment for costs alone had been entered) after the order for the new trial is made and before the costs are paid. *Blumenthal* v. *Kurth*, 173.
4. Where an order granting a new trial to a defendant, on condition of his paying costs, is after the lapse of several terms and before the payment of the costs by defendant, vacated on the motion of plaintiff; *held*, that defendant is not entitled to notice of this motion. *Ib.*

PRACTICE—(*Continued.*)

5. Case affirmed, because no exceptions were taken to the action of the court, and no bill of exceptions filed and allowed. *State* v. *Wiedner*, 327; *Ames* v. *Bircher*, 586.
6. A motion to set aside a judgment by default is no part of the record, unless made so by the bill of exceptions. *Loudon* v. *King*, 336.
7. No finding of facts is necessary upon an assessment of damages after judgment by default. *Ib.*
8. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him. *Neal* v. *Smith*, 349.
9. In a suit by husband and wife under the practice act of 1849, the affidavit of the husband is a sufficient verification of the petition. *Huntingdon* v. *House*, 365.
10. It is too late to object to the verification of a petition when the case is called for trial. *Ib.*
11. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Slover* v. *Muncy*, 391.
12. Where the amount of damages claimed by the plaintiff in a suit before a justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may in the justice's court enter a *remittitur* for the excess recovered beyond the justice's jurisdiction, he can not be permitted to do this in the circuit court on appeal, so as to give jurisdiction. *Batchelor* v. *Bess*, 402.
13. If, in order to authorize the supreme court to reverse a judgment, in a case commenced before a justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court; this is sufficiently shown by a motion for a review in which objection is made, although a motion for a review is not applicable in such a case. *Ib.*
14. Judgment reversed because it appeared from the record that, after a judgment for costs was rendered against the plaintiff, a final judgment by default was rendered against the defendant without his appearance and without setting aside the former judgment. *McAdams* v. *McHenry*, 413.
15. Under the practice act of 1849, where a statement of facts is agreed upon by the parties, no finding of facts is necessary. *White* v. *Walker*, 433.
16. Where a party prosecuted as a vagrant under the statute, (R. C. 1845,) is discharged, judgment for costs may be given against the informer. *Ib.*

PRACTICE—(*Continued.*)

17. In an action against the sureties in a constable's bond, the judgment was, under the circumstances, reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a motion to dismiss overruled and before judgment by default, to file their answer setting up lapse of time as a bar. *State* v. *Bird*, 470.
18. Where a cause is tried by the court sitting as a jury, it is not erroneous to refuse instructions asked by either party to the suit. *Wilbur* v. *Clark*, 503.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See INDICTMENT. CRIMES AND PUNISHMENTS.

1. Where a justice of the peace is indicted for misdemeanor in office, it is not necessary that the prosecutor's name should be endorsed on the indictment. *State* v. *Allen*, 318.
2. Whether a justice of the peace, in improperly issuing a warrant for the arrest of an individual, did the same *maliciously*, is a question for the jury. *Ib.*
3. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief—all the witnesses for the prosecution having been sworn—it is discovered that the prisoner has never been formally arraigned, and by order of court he is then arraigned and pleads not guilty, and objects to any further proceeding in the cause, asking that he may be discharged; *held*, 1st, that it is not erroneous, to so cause him to be arraigned; 2d, that it is not erroneous, the jury being re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn. *State* v. *Weber*, 321.
4. An appeal on the part of the State can not be taken in a criminal case, where judgment has been given for the defendant on a demurrer to a plea to the indictment. This is not a case within the 10th section of article 8 of act to regulate proceedings in criminal cases. (R. C. 1845, p. 889.) *State* v. *Rowe*, 328.
5. It lies in the discretion of the court, whether it will compel the State to elect the count of an indictment on which the defendant shall be tried. (State v. Jackson, 17 Mo. 544, affirmed.) *State* v. *Leonard*, 449.
6. The constitutionality of a law establishing a new county can not be inquired into upon a motion to quash an indictment found in a court of such county. (State v. Rich, 20 Mo. 393, affirmed.) *State* v. *York*, 462.

PRESUMPTIONS.

1. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument or any direct proof of its existence, and which juries are sometimes permitted, and, if the

PRESUMPTIONS—(*Continued.*)

facts warrant, directed to draw, is a disputable presumption and not a conclusive presumption, or *presumptio juris et de jure*. *Dessaunier* v. *Murphy*, 95.

PRINCIPAL AND AGENT.

See MASTER AND SERVANT.

1. The agent who sells goods, of which he is in possession, as his own property, may recover the price in his own name. *Coggburn* v. *Simpson*, 351.
2. Where a party is in possession of a store, as a clerk or agent of another, his possession is that of his principal. *Ib.*
3. A party who is compelled to pay a note which he signed as security for another, who gave it for money borrowed by him as *agent* for a third party, may recover the amount directly from him for whom the money was borrowed; and it makes no difference that the agent did not disclose his agency, or that the money was loaned and the note signed by the security upon his individual credit. *Higgins* v. *Dellinger*, 397.
4. A letter written by the party sought to be charged as principal, not denying his liability, but regretting his inability to meet the demand, is evidence sufficient to sustain a finding by a jury of the fact of agency, although written in answer to a letter falsely stating that he had signed the note. *Ib.*

PRINCIPAL AND SURETY.

See AGREEMENT, 5, 6, 7.

1. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defence arising out of the relation of principal and surety. *Picot* v. *Signtago*, 587.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

See MECHANIC'S LIEN, 1.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should be actually made to the maker of the note himself; any false and fraudulent representations held out and made to the world at large for purposes of deception, as by the public statement of the condition of the company, and relied upon by the maker of the note, will constitute a good defence. *City Bank* v. *Phillips*, 85.
2. Notice to several directors of a bank, taking a note by endorsement, of fraud in the consideration of the note, is notice to the bank. Such notice may well be presumed, where some of the directors of the bank

PROMISSORY NOTES AND BILLS OF EXCHANGE—(*Continued.*)

are also directors of an insurance company, by whom the note was endorsed to the bank, and in whose hands the note was void for fraud. *Ib.*

3. Instruments in the following forms: "Due A. B. $100, to be paid over to him as soon as collected at P., now in the hands of H. B. P. of that place," and "Due A. B. $34 63 for goods purchased of him while at P., to be paid as soon as collected from my accounts at P.," are promissory notes, not mere *conditional* obligations to pay. The words "to be paid," &c., merely prescribe the time of payment by indicating the fund out of which the debtor expects to pay, and thereby securing to him the delay necessary to render it available. *Ubsdell & Pierson* v. *Cunningham*, 124.
4. When all has been collected upon the claims that can be collected at all, the notes become due and payable. *Ib.*
5. A note is executed to three partners, two of whom upon a settlement of the partnership affairs, for value, sell and transfer by delivery their interest in the note to the third. *Held*, that the third might sue on the note in his own name. *Canefox* v. *Henderson*, 347.
6. Where a material alteration is made in a promissory note by one unauthorized by, and without the knowledge or consent of, the owner of such note, the note is not thereby avoided as against such owner. *Lubbering* v. *Kohlbrecher*, 596.

PUBLICATION.

See SUPREME COURT, 6.

R

RECOGNIZANCE OF APPEAL.

1. A voluntary dismissal of an appeal by the defendant in an action of forcible entry and detainer, is a breach of the condition of a recognizance to prosecute the appeal with effect and without delay, and the party aggrieved may have relief in an ordinary action on the recognizance. *Wilcox* v. *Daniels*, 493.

RECOGNIZANCE, CRIMINAL.

See PRACTICE, 2.

1. A criminal recognizance taken by a county court, as such, must be certified under the seal of the court. If taken by the judges, as magistrates, it must be certified by them, and not by the clerk of the court. *State* v. *Zuifle*, 467.
2. As to the essentials of a criminal recognizance. *State* v. *Randolph*, 474.
3. Where a recognizance is improperly certified, the defect may be amended at any time before the objection is disposed of, on such terms as will protect the party from being prejudiced by it. *Ib.*

RECOGNIZANCE, CRIMINAL—(*Continued.*)

4. It is not essential to the validity of a recognizance taken by a justice, conditioned that a party shall appear in court "to answer an indictment, and not depart without leave," that it should describe the offence with which the party is charged, or state the facts which gave the justice jurisdiction; nor need these facts be stated in the writ of *scire facias*. It is sufficient that they appear on the files and entries of the court. *Ib.*
5. A demurrer to a *scire facias* upon a forfeited recognizance, is not to be regarded as taken to what appears in the writ or in the recognizance, but to what appears of record. *Ib.*
6. A proceeding by *scire facias* upon a forfeited recognizance, is not a civil action within the meaning of the practice act of 1849, but a mere continuation of an existing proceeding. *Ib.*

REGISTRY ACTS.

See NOTICE, 1, 2, 3.

REPLEVIN.

See ACTION FOR THE DELIVERY OF ERSONAL PROPERTY.

RIGHT OF ENTRY.

See LIMITATION OF ACTIONS, 1.

RIGHT OF SUPPORT.

1. Although every proprietor of land has a right to the support of the soil of an adjacent lot, as a natural servitude or easement, yet this servitude does not impose upon the adjoining proprietor the obligation of furnishing an increased support where lateral pressure is increased by the erection of buildings, unless such a right of servitude has been conferred by grant or the lapse of time. *Charless* v. *Rankin*, 566.
2. Where excavations are made upon one of two contiguous lots, the proprietor making the same will be responsible for all damage caused to buildings or other property upon the adjoining lot by reason of such excavation having been negligently made. *Ib.*
3. It is however erroneous to rule that the proprietor having the excavating done is bound to use such care and caution as a prudent man, experienced in such work, would have exercised, if he had himself been the owner of the injured building. Such a ruling tends to mislead, as one who is proprietor of both the contiguous lots might very prudently subject himself to expense and inconvenience for the protection of his building, that could not justly be imposed upon one making excavations upon an adjoining lot belonging to him. *Ib.*
4. The excavator can not set up as a defence that he used such care as his builder and superintendent, a skillful and careful person, deemed necessary. The decisive question is, whether there was actual negligence in making the excavation. *Ib.*

ROAD OVERSEER.

See INDICTMENT, 11.

1. The list of delinquents, which the road overseer is required to place in the hands of the justice, (R. C. 1845, tit. Roads and Highways, art. 1, § 45,) is for the information and government of the justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary. *Slover* v. *Muncy*, 391.
2. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Ib.*

ROAD AND CANAL FUND.

1. The sums received by the several counties of this state out of the "road and canal fund" under the several acts of the general assembly, (see R. C. 1835, p. 553; Sess. Acts, 1836–7, p. 108–9,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the said counties on bonds executed in their favor by persons to whom portions of said fund had been loaned. *County of St. Charles* v. *Powell*, 525.

S

SALE.

See BILL OF SALE. CONVEYANCE.

1. A. transferred to B. a negro slave, and gave a bill of sale absolute on its face, but intended merely as a security for indebtedness of A. in favor of B.; the slave, although delivered to B. at the date of the bill of sale, and retained by him for a few days, was permitted to remain in possession of A. until his death shortly after; A.'s administrator, upon the production by B. of the absolute bill of sale, thinking B. justly entitled to the slave, received from him a sum of money alleged to be the balance of the purchase money due A.'s estate, and gave a receipt for the same and surrendered the slave to B. *Held*, that this transaction did not amount to a sale of the slave by the administrator to B., nor did it cut off the equity of redemption belonging to A.'s estate. *Phillips* v. *Hunter*, 485.
2. A sale by an administrator, under an order of the county court, of an equity of redemption in a slave, is valid, although the slave is in the possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the slave. *Ib.*

SCIRE FACIAS.

See RECOGNIZANCE, 4, 5, 6.

SEDUCTION.

1. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother by giving evidence in a former judicial proceeding that she had had an illegitimate child before her marriage with plaintiff's father. *Grider* v. *Dent*, 490.

SEIZIN.

See CURTESY, 4.

SEPARATION OF THE JURY.

See JURY, 1.

SLANDER.

1. Words charging a woman with being a "whore" are actionable *per se*. *Hudson* v. *Garner*, 423.
2. An inuendo in the petition, that the defendant intended by such words to charge the plaintiff with adultery, being unnecessary, may be rejected. *Ib.*
3. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Ib.*

SLAVES.

1. A. by instrument of writing not under seal, executed in the year 1838, conveyed to B. a negro slave; A. retained possession of the slave until his death in 1853; *held*, that B. had no title to the slave. *Jones' Administrator* v. *Covington*, 163.
2. Under the law as it stood in 1838, (see R. C. 1835, p. 588,) in order to perfect a gift of a slave so as to divest the title of the giver even as against himself, there must have been either a change of the possession or a recorded instrument of the character designated in the statute. Per LEONARD, J. (SCOTT, J., nonconcurring in this doctrine, holding that a deed of gift of a slave, under seal, will pass a title to such slave, notwithstanding the said statute. The common law respecting gifts was in force, notwithstanding the statute.) *Ib.*
3. A parol gift of a slave to one for life, remainder to her children, then living, followed by the possession of the donee for life, is valid. *Pemberton* v. *Pemberton*, 338.

SPANISH LAW.

See COMMUNITY.

1. The Spanish law superseded the French law in the district of Illinois (afterwards Upper Louisiana) as early as the year 1777. *Cutter* v. *Waddingham*, 207.
2. By the Spanish law prevailing here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law,

SPANISH LAW—(*Continued.*)

(as for example the French law,) to regulate their property relations as husband and as wife; as by stipulating for the establishment of a community between the parties according to the custom of Paris. *Ib.*

3. By the Spanish law of second marriages, a widow, having become such when over the age of twenty-five years, on her second marriage forfeited to the children of the first marriage all the property that she may have acquired from her deceased husband, by a lucrative title, either immediately, or mediately through an intestate succession to a deceased child of the first marriage. Immediately upon the second marriage the title to the property vested in the children, she, however, retaining the usufruct during her life. *Ib.*
4. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that, too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Ib.*

SPECIFIC PERFORMANCE.

1. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract. *Hook* v. *Turner*, 333.

STATUTE OF FRAUDS.

1. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract. *Hook* v. *Turner*, 333.
2. A contract was made for the sale of cattle in the field of the seller. The purchaser told the seller to keep the cattle and feed them until he sent for them, at the expense of the purchaser. The seller agreed to do so, but told the purchaser that, if any of them died, he must bear the loss, to which the latter assented. *Held*, no delivery to take the contract out of the statute of fraud. *Kerby* v. *Johnson*, 354.

SUCCESSION.

1. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that,

SUCCESSION—(*Continued.*)

too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the viens of one claiming to succeed to an estate, except in the case of brothers aud sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Cutter* v. *Waddingham*, 206.

SUPPORT.

See RIGHT OF SUPPORT.

SUPREME COURT.

See PRACTICE.

1. The supreme court will not reverse a judgment on the ground that the court has not permitted a party to have the opening and the closing of the case to the jury, unless such refusal has produced a wrong to the party. *Tibeau* v. *Tibeau*, 77.
2. Where evidence rejected is of too vague and indecisive a character to produce any effect on the finding of the facts by the court, the supreme court will not reverse the judgment of the court below. *Conrad* v. *Belt's Adm'r*, 166.
3. To induce the supreme court to interfere with the finding of the facts by the lower court, such finding must be clearly wrong; it is not sufficient that, from the evidence, the finding might have been different; it must be a strong case. *Ib.*
4. The supreme court will not grant a new trial on the ground that the verdict of the jury is against the weight of evidence. *Goetz* v. *Ambs*, 170.
5. Where the damages awarded by the jury are excessive, and unwarranted, the supreme court will award a new trial, if the ends of justice will be subserved thereby. *Ib.*
6. The Supreme Court will not disturb a judgment rendered upon an insufficient publication, unless a motion to set the same aside has been made in the inferior court. *Woods, Christy & Co.* v. *Mosier*, 335.
7. The rejection by the court trying a cause of a competent juror is no ground for reversal in the supreme court, there being no valid objection to the jurors empannelled. *West* v. *Forrest*, 344.
8. The supreme court will not reverse a judgment for the giving of an instruction which could not have prejudiced the appellant, nor for the refusal of instructions not warranted by the evidence. *Pasley* v. *Kemp*, 409.
9. In an action against the sureties in a constable's bond, the judgment was, under the circumstances, reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a

SUPREME COURT—(*Continued.*)

motion to dismiss overruled and before judgment by default, to file their answer setting up lapse of time as a bar. *State* v. *Bird*, 470.

10. The supreme court will not reverse a judgment of a lower court because the verdict of the jury is against the weight of evidence. *Holliday* v. *Atterbury*, 512.
11. Where a cause is tried by the court sitting as a jury, the finding of the facts should warrant the conclusion of law declared by the court and the judgment rendered; in reviewing the law of a case upon the facts found, the supreme court will not, from the facts, as found, infer or declare the existence of other facts. *Pearce* v. *Burns*, 577; *Pearce* v. *Roberts*, 582.

SURETY.

See PRINCIPAL AND SURETY.

T

TAXES.

See JURISDICTION, 1.

TON.

See EVIDENCE, 12, 13.

TROVER.

1. A refusal to deliver up a chattel to the owner on demand, without lawful excuse, is a conversion. *O'Donoghue* v. *Corby*, 393.
2. It is no excuse for refusing to deliver up to the owner a paper evidencing a debt, that the debt is not justly owing, nor can it be imposed as a condition to the delivery that he shall refund what he has already received upon it. *Ib.*
3. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie* the amount the paper calls for, though this may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be. *Ib.*

TRUST.

See EQUITY, 1, 2. DEED OF TRUST, 1.

1. *Semble:* That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is held subject to a trust must be determined by the law of Illinois. *Pensenneau* v. *Pensenneau*, 27.

V

VARIANCE.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey* v. *Evans*, 157.

VERDICT.

See SUPREME COURT, 4, 5.

VERIFICATION.

See PRACTICE, 9, 10.

W

WAIVER.

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien. *Gorman* v. *Sagner*, 137.

WARRANT.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner* v. *Platte County*, 437.

WILLS AND TESTAMENTS.

See MARRIAGE CONTRACT, 1.

1. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing the same. *Goode* v. *Goode*, 518.

WITNESS.

1. In impeaching a witness, evidence of his general character for truth and veracity, among a *majority* of his neighbors, is inadmissible. *Emory* v. *Phillips*, 499.

WOUNDING.

See CRIMES AND PUNISHMENTS, 3.